



## **DEPARTMENT OF LABOR**

### **Occupational Safety and Health Administration**

#### **29 CFR Part 1952**

**Docket ID. OSHA 2012-0029**

**RIN 1218-AC78**

### **Hawaii State Plan for Occupational Safety and Health**

**AGENCY:** Occupational Safety and Health Administration, Department of Labor.

**ACTION:** Final Rule

**SUMMARY:** This document announces the Occupational Safety and Health Administration's (OSHA) decision to modify the Hawaii State Plan's "final approval" determination under Section 18(e) of the Occupational Safety and Health Act (the Act) and to transition to "initial approval" status. OSHA is reinstating concurrent federal enforcement authority over occupational safety and health issues in the private sector, which have been solely covered by the Hawaii State Plan since 1984.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]

#### **FOR FURTHER INFORMATION CONTACT:**

For press inquiries: Francis Meilinger, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 693-1999; email: [meilinger.francis2@dol.gov](mailto:meilinger.francis2@dol.gov).

For general and technical information: Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, Room N-3700, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington DC 20210; telephone: (202) 693-2200; email: [kalinowski.doug@dol.gov](mailto:kalinowski.doug@dol.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Hawaii administers an OSHA-approved state plan to develop and enforce occupational safety and health standards for public and private sector employers, pursuant to the provisions of Section 18 of the Act. The Hawaii State Plan received initial federal OSHA plan approval on December 28, 1973 (39 FR 1010) and the Hawaii Occupational Safety and Health Division (HIOSH) of the Hawaii Department of Labor and Industrial Relations is designated as the state agency responsible for administering the state plan. Pursuant to Section 18(e) of the Act, OSHA granted Hawaii “final approval” effective April 30, 1984 (49 FR 19182). Final approval under Section 18(e) requires, among other things, a finding by the Assistant Secretary that the plan, in actual operation, provides worker protection “at least as effective as” that provided by federal OSHA. A final approval determination results in the relinquishment of federal concurrent enforcement authority in the state with respect to occupational safety and health issues covered by the plan. 29 U.S.C. 667(e).

During the past three years, the Hawaii State Plan has faced major budgetary and staffing restraints that have significantly affected its program. Impacts on the state plan are clearly reflected throughout OSHA’s recent monitoring reports. Joint efforts were made by federal OSHA and HIOSH to address these issues, yet Hawaii continues to face severe programmatic, staffing and training challenges. Therefore, the Hawaii Director of Labor and Industrial Relations has requested a temporary modification of the state plan’s approval status from final approval to initial approval, to permit exercise of supplemental federal enforcement activity and to allow Hawaii sufficient time and assistance to

strengthen its state plan. Hawaii has pledged to accomplish the necessary corrective action to regain final approval status in a timely manner. Hawaii's proactive efforts demonstrate a commitment to ensuring that workers are afforded adequate protection during this period of program strengthening and improvement.

Pursuant to the procedures set forth at 29 CFR 1902.47 *et seq.*, OSHA published notice of its reconsideration of Hawaii's 18(e) determination; proposed resumption of concurrent federal enforcement authority; and a request for written comments and opportunity to request an informal hearing on July 19, 2012 (77 FR 42462). That notice also contains a more detailed description of the Hawaii State Plan and the identified deficiencies. The 35-day comment period closed on August 23, 2012 and OSHA received four (4) written comments, including two (2) requests for a hearing.

### **Decision**

Pursuant to the procedures set forth in 29 CFR 1902.47 *et seq.*, the Assistant Secretary for Occupational Safety and Health has made a final decision to modify the Hawaii State Plan's approval status from 18(e) final approval to initial approval, and to reinstate concurrent federal enforcement authority over occupational safety and health issues in the state, pending the necessary corrective action by the state plan in order to once again meet the criteria for an 18(e) final approval determination. Concurrent federal enforcement authority will be exercised in Hawaii effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

The Assistant Secretary's decision is based upon the facts determined by OSHA in monitoring the Hawaii State Plan and HIOSH's request for enforcement assistance, and was reached after opportunity for public comment. Three organizations and one

individual filed a comment with the agency within the public comment period.

Comments were received from the Hawaii Business League, Veterans of Safety Hawaii Chapter, Island Insurance Company, Ltd., and Dr. Walter Chun. OSHA has reviewed and considered the comments, and the following discussion addresses the comments and OSHA's responses.

The Hawaii Business League stated a strong preference for Hawaii to maintain a state plan and voiced favorable support for a transition to initial approval as means to progress towards restoration of Hawaii's 18(e) final approval status. Island Insurance Company, Ltd. and Dr. Walter Chun raised concerns about how HIOSH allows for greater penalty reductions than federal OSHA, and about whether fines/penalties will be part of the criteria for the Hawaii State Plan to regain its 18(e) final approval status.

Pursuant to 29 CFR § 1902.42(a), “[i]n making an affirmative 18(e) determination, the Assistant Secretary determines that a State has applied the provisions of its plan, or any modification thereof, in accordance with the criteria of Section 18(c) of the Act and that the State has applied the provisions of this part in a manner which renders the actual operations of the state program ‘at least as effective as’ operations under the Federal program.” One of the criteria in Section 18(c) of the Act is the development and enforcement of safety and health standards, and penalties are an essential component of effective safety and health enforcement in the workplace. Therefore, Hawaii’s overall penalty policy would be evaluated in the course of regaining 18(e) final approval status.

In response to Dr. Walter Chun’s further questions, the addendum referenced in the Operational Status Agreement (OSA) will not be available for public comment. The addendum is an internal working document between the Director of the Hawaii

Department of Labor and Industrial Relations and OSHA's Regional Administrator for Region IX, outlining the plan of action and milestones for the Hawaii State Plan to work towards regaining 18(e) final approval status. During the period of concurrent state and federal authority, both Hawaii and federal OSHA have authority to conduct inspections and issue citations. However, the terms of the OSA will delineate areas of coverage to ensure employers are not burdened with duplicative enforcement efforts. Federal OSHA compliance officers will be conducting inspections, in accordance with the terms of the OSA, and issuing citations and penalties under federal standards. OSHA is not aware that any changes in the state's rules or regulations are necessary to accommodate concurrent jurisdiction.

Dr. Walter Chun and Veterans of Safety Hawaii Chapter both requested an informal public hearing, to address the public's questions and comments. The public comments and questions submitted on the docket have all been addressed in this notice and there are no substantial issues raised that necessitate a public hearing.

### **Effect of the Decision**

The Assistant Secretary's decision to modify the Hawaii State Plan's status from final to initial approval would authorize OSHA to carry on an enforcement program to supplement that of HIOSH, including independent federal or joint state and federal inspections resulting in issuance of appropriate federal citations. However, modifying Hawaii's final approval status would not affect Hawaii's basic plan approval and would not affect Hawaii's legal authority to enforce state occupational safety and health standards in the state's workplaces. This modification would leave Hawaii's federally-

approved state plan completely in place, and would simply reinstate federal OSHA's authority to supplement state enforcement during this difficult period.

Federal OSHA inspections or joint state and federal OSHA inspections may result in the issuance of appropriate federal citations and penalties. Federal OSHA compliance officers may issue citations effective immediately. Contested federal citations and penalties will be reviewed by the Federal Occupational Safety and Health Review Commission (OSHRC). Federal OSHA will continue to exercise federal authority over safety and health issues excluded from coverage under the state plan; monitoring inspections including accompanied visits; and other federal authority not affected by the 1984 final approval decision.

#### **Notice of the Operational Status Agreement**

Federal OSHA will exercise its enforcement authority according to the terms of the 2012 OSA between OSHA and HIOSH, which specifies the respective areas of federal and state authority. OSHA will continue to exercise federal enforcement of federal requirements for safety and health in private sector maritime activities, 29 CFR 1915 and Parts 1917-1920, as well as provisions of the general industry and construction standards appropriate to hazards found in those employments. Federal jurisdiction also remains in effect over: federal government employers and workers, and contractors or subcontractors on any federal establishment where the land is determined to be exclusive federal jurisdiction; private sector employers within the secured borders of all military installations where access is controlled; and U.S. Postal Service (USPS), including USPS workers, and contract workers and contractor-operated facilities engaged in USPS mail operations. OSHA will also exercise authority over OSHA requirements promulgated

under the Act subsequent to the OSA where necessary to protect employers, as in the case of emergency temporary standards promulgated under Section 6(c) of the Act, until Hawaii has promulgated comparable standards.

The OSA further provides that federal enforcement authority under Section 18 of the Act may be exercised with regard to federal occupational safety and health requirements over agriculture and general industries, excluding transportation and warehousing. Potential violations where the employer is in compliance with federal regulations, but not with more stringent HIOSH regulations, shall be referred to HIOSH.

HIOSH will retain enforcement authority in any case commenced before [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]. Additionally, HIOSH will exercise inspection and enforcement authority over: the construction industry, transportation and warehousing; state and local government as an employer; and referrals from federal OSHA to HIOSH.

The OSA also provides that HIOSH and federal OSHA will retain concurrent enforcement authority over employment discrimination complaints, pursuant to Section 11(c) of the Act. Employees may continue to file occupational safety and health whistleblower complaints with federal OSHA, the state, or both. However, the OSA provides that, in accordance with OSHA's long-standing policy, OSHA will generally continue to refer all employment discrimination complaints that are federally-filed by private-sector and non-federal public sector employees to HIOSH for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. The OSA explains that federal OSHA will investigate any allegations of retaliation covered under the OSHA-administered whistleblower laws other than Section 11(c).

If there arises any case or circumstance in which authority is not clearly defined in the OSA, OSHA and HIOSH will resolve the issue. In the meantime, (e.g., where quick response is required such as a fatality, catastrophe or significant event), OSHA shall respond to the situation.

Federal OSHA may conduct monitoring visits under Section 18(f) of the OSH Act. The OSA also provides that OSHA may also accompany HIOSH on enforcement activities for purposes of technical assistance and training. And HIOSH may accompany federal OSHA on enforcement activities for training purposes. The OSA is subject to revision or termination by mutual agreement of the parties, by either party upon 30 days written notice, or when the results of evaluation or monitoring reveal that state operations are at least as effective as the federal program and responsibilities may be returned to the state. Finally, the OSA includes an Addendum with goals and milestones for returning all enforcement responsibilities to Hawaii.

### **Regulatory Flexibility Analysis and Unfunded Mandates**

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (as amended), OSHA examined the regulatory requirements of the final rule to determine whether it would have a significant economic impact on a substantial number of small entities. Since no employer of any size will have any new compliance obligations, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. OSHA also reviewed this final rule in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501 et seq.) and Executive Order 12875 (56 FR 58093). Because this rule imposes no new compliance



obligations, it requires no additional expenditures by either private employers or State, local, and tribal governments.

## **Federalism**

Executive Order 13132, “Federalism,” (64 FR 43255, August 10, 1999) emphasizes consultation between Federal agencies and the States and establishes specific review procedures the Federal government must follow as it carries out policies which affect State or local governments. OSHA has consulted extensively with Hawaii about this modification of its approval status. Although OSHA has determined that the requirements and consultation procedures provided in Executive Order 13132 are not applicable to approval decisions under the Act, which have no effect outside the particular State, OSHA has reviewed this final rule, and believes it is consistent with the principles and criteria set forth in the Executive Order.

## **Why the Immediate Effective Date**

OSHA finds that good cause exists for making this rule effective immediately upon publication in the *Federal Register*. The current situation in the state indicates the immediate need for supplementary federal occupational safety and health enforcement activity for the protection of workers in Hawaii. In addition, today’s action does not impose any new compliance obligations on affected employers since standards enforced under the Hawaii State Plan are either identical to federal standards, or more stringent.

## **List of Subjects in 29 CFR Part 1952**

Intergovernmental relations, Law enforcement, Occupational safety and health.

## **AUTHORITY AND SIGNATURE**

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, D.C., authorized the preparation of this notice. OSHA is issuing this notice under the authority specified by Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Secretary of Labor's Order No. 1-2012 (77 FR 3912), and 29 CFR part 1905.

Signed in Washington, DC, on September 18, 2012.

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**David Michaels, PhD, MPH,**  
*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, for the reasons set forth in the preamble, 29 CFR Part 1952 is amended as set forth below.

## **PART 1952 – [AMENDED]**

1. The authority citation for Part 1952 is revised to read as follows:

Authority: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR part 1902; Secretary of Labor's Order No. 1-2012 (77 FR 3912).

### **Subpart Y – Hawaii**

2. Remove and reserve § 1952.313, to read as follows:

**§ 1952.313 [Reserved]**

3. Revise § 1952.314 to read as follows:

**§ 1952.314 Level of Federal enforcement.**

(a) With Hawaii's agreement and as a result of the Assistant Secretary's reinstatement of Hawaii's initial approval status, Hawaii and Federal OSHA will begin exercising concurrent jurisdiction under section 18(e) of the Act on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(b) To provide a workable division of enforcement responsibilities, Hawaii and Federal OSHA have entered into an operational status agreement. Notice of this agreement was provided in the Federal Register on [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]. Electronic copies of the agreement are available at:

<http://www.osha.gov/dcsp/osp/stateprogs/hawaii.html>.

**BILLING CODE: 4510-26-P**

**[FR Doc. 2012-23366 Filed 09/20/2012 at 8:45 am; Publication Date: 09/21/2012]**